

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

BERNARD ANTHONY SMITH,

Plaintiff,

vs.

CORNELL SMITH, KATHY WEISS,  
PAM WISE, DARIUS MILLER, JANET  
STANGE, BOB JOHNSON, MARY  
WITTRY, MURIEL MCDERMOTT,  
LYNN WUEBKER, JASON JANNSEN,  
ROBIN BAGBY, JOHN BALDWIN,

Defendants.

No. C15-3094-MWB

**ORDER**

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The matter before the court is the plaintiff's application to proceed in forma pauperis (docket no. 1). The plaintiff filed such application on February 11, 2015. Along with his application to proceed in forma pauperis, the plaintiff submitted a complaint under 42 U.S.C. § 1983 (docket no. 1-1) and exhibits (docket no. 1-2). Additionally, the plaintiff submitted an application for appointment of counsel (docket no. 2) and a motion to amend (docket no. 3).

***I. IN FORMA PAUPERIS UNDER 28 U.S.C. § 1915***

The plaintiff did not submit the statutory filing fee. *See* 28 U.S.C. § 1914(a) (requiring filing fee). In order for a court to authorize the commencement of an action without the prepayment of the filing fee, a person must submit an affidavit that includes a statement of all the assets the person possesses. 28 U.S.C. § 1915(a)(1). In addition, a prisoner must submit a certified copy of the trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint,

obtained from the appropriate official of each prison at which the prisoner was or is confined. 28 U.S.C. § 1915(a)(2). Based on the plaintiff's application and certificate of inmate account, it is clear that the plaintiff does not have sufficient funds to pay the required filing fee. Thus, in forma pauperis status shall be granted to the plaintiff. *See generally* 28 U.S.C. § 1915. The clerk's office shall file the complaint without the prepayment of the filing fee.

A prisoner bringing a civil action in forma pauperis is required to pay the full \$350.00 filing fee. 28 U.S.C. § 1915(b)(1). The full filing fee will be collected even if the court dismisses the case because it is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Because the court deemed it appropriate to grant the plaintiff in forma pauperis status, the plaintiff is required to pay the full filing fee by making payments on an installment basis. 28 U.S.C. § 1915(b)(1); *see also In re Tyler*, 110 F.3d 528, 529-30 (8th Cir. 1997) (“[T]he [Prisoner Litigation Reform Act] makes prisoners responsible for their filing fees the moment the prisoner brings a civil action or files an appeal.”).

Concerning the computation of the initial partial filing fee, the plaintiff is required to submit 20 percent of the greater of his average monthly account balance or average monthly deposits for the six months preceding the filing of the complaint. 28 U.S.C. § 1915(b)(1). Based on his average monthly deposits, the court finds that the initial partial filing fee is \$14.00. *Id.* The plaintiff shall submit \$14.00 by no later than October 2, 2015. *Id.* If the court does not receive payment by this deadline, the instant action shall be dismissed.<sup>1</sup> *See* Fed. R. Civ. P. 41(b) (permitting dismissal where a plaintiff either fails

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<sup>1</sup> If the plaintiff does not submit the required initial partial payment by October 2, 2015, he must explain by no later than October 16, 2015 whether his failure to pay was caused by circumstances beyond his control, such as prison officials' failure to adhere to his request to remit payment using funds from his account, or whether his nonpayment was caused by his failure to leave sufficient funds in the account to pay the initial partial

(continued...)

to prosecute or fails to respond to an order of the court); *Barnett v. Ray*, 320 F. App'x 823, 824-25 (10th Cir. 2009) (same); *Kennedy v. Reid*, 208 F. App'x 678, 679 (10th Cir. 2006) (same); *Hutchins v. A.G. Edwards & Sons*, 116 F.3d 1256, 1259-60 (8th Cir. 1997) (explaining court's power to dismiss an action); *Edgington v. Missouri Dept. of Corrections*, 52 F.3d 777, 779-80 (8th Cir. 1995) (same), abrogated on other grounds by *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005). If necessary, the plaintiff may request in a written motion an extension of time to pay the initial partial filing fee.

In addition to the initial partial filing fee, the plaintiff must “make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account.” 28 U.S.C. § 1915(b)(2). The statute places the burden on the prisoner’s institution to collect the additional monthly payments and forward them to the court. Specifically,

[a]fter payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account. The agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

28 U.S.C. § 1915(b)(2). Therefore, after the plaintiff pays in full the initial partial filing fee, the remaining installments shall be collected by the institution having custody of the plaintiff. *Id.* The clerk’s office shall send a copy of this order and the notice of collection of filing fee to the appropriate official at the place where the plaintiff is an inmate.

## ***II. APPLICATION FOR APPOINTMENT OF COUNSEL***

Appointment of counsel is based on multiple factors, including the complexity of the case, and, although the court has the ability to appoint an attorney in a civil case arising under 42 U.S.C. § 1983, it is not required to do so. *See Phillips v. Jasper County*

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<sup>1</sup>(...continued)  
payment. *See Sims v. Davis*, 589 F. App'x 813 (8th Cir. 2015) (citing *George v. Tucker*, 570 F. App'x 629 (8th Cir. 2014)).

*Jail*, 437 F.3d 791, 794 (8th Cir. 2006); *see also Taylor v. Dickel*, 293 F.3d 427, 428 (8th Cir. 2002) (discussing 28 U.S.C. § 1915(e)(1)); *Davis v. Scott*, 94 F.3d 444, 447 (8th Cir. 1996) (setting forth factors to be considered for appointment of counsel in civil case); *Abdullah v. Gunter*, 949 F.2d 1032, 1035 (8th Cir. 1991) (same); *Wiggins v. Sargent*, 753 F.2d 663, 668 (8th Cir. 1985) (stating an indigent litigant enjoys neither a statutory nor a constitutional right to have counsel appointed in a civil case). Given the record in this action, the court finds that the plaintiff will benefit from the appointment of counsel. Accordingly, the plaintiff's application for appointment of counsel shall be granted. The clerk's office shall be directed to appoint an attorney to represent the plaintiff. The cost for such appointment shall be paid from the Library Fund and shall be consistent with the contract that applies in this district.

### ***III. MOTION TO AMEND***

Because the court granted the plaintiff in forma pauperis status and is required to review the merits of the plaintiff's claims, it is appropriate to allow the plaintiff to amend his complaint. Accordingly, the plaintiff's motion to amend shall be granted. All of the plaintiff's pleadings will be considered when the court reviews the plaintiff's claims under 28 U.S.C. § 1915(e)(2).

### ***IV. AMENDED COMPLAINT***

With respect to the plaintiff's amended complaint, the court is unable to determine as a matter of law whether it is frivolous or fails to state a claim within the meaning of 28 U.S.C. § 1915 or 28 U.S.C. § 1915A. Consequently, the court is of the opinion that the matter is best addressed after receipt of an answer and/or any dispositive motion deemed appropriate. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 1831, 104 L. Ed. 2d 338 (1989); *Money v. Moore*, 877 F.2d 9, 10 (8th Cir. 1989). The clerk's office shall serve the amended complaint on the defendants and mail a copy of the amended complaint to the Iowa Attorney General without the prepayment of fees and costs. A copy of this order is to accompany the documents being served. The Iowa Attorney General shall notify the court immediately if he lacks the consent of the defendants to appear generally

on their behalf and submit to the jurisdiction of the court. The defendants shall file an answer or other dispositive motion by no later than October 2, 2015.

**IT IS THEREFORE ORDERED:**

1) The plaintiff's application to proceed in forma pauperis (docket no. 1) is granted. The plaintiff is directed to submit an initial partial filing of \$14.00 by no later than October 2, 2015. If necessary, the plaintiff may request in a written motion an extension of time to pay the initial partial filing fee. Additionally, after the plaintiff pays the initial partial filing fee, the institution having custody of the plaintiff is directed to collect and remit monthly payments in the manner set forth in 28 U.S.C. § 1915(b)(2). Until the \$350.00 filing fee is paid in full, the plaintiff is obligated to pay and the institution having custody of him is obligated to forward 20 percent of the preceding month's income credited to his account each time the amount in the account exceeds \$10.00.

(2) The clerk's office is directed to send a copy of this order and the notice of collection of filing fee to the appropriate official at the place where the plaintiff is an inmate.

(3) The clerk's office is directed to file the plaintiff's complaint (docket nos. 1-1 & 3) without the prepayment of the filing fee.

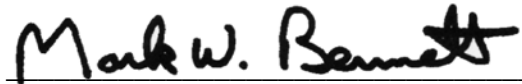
(4) The plaintiff's application for appointment of counsel (docket no. 2) is granted. The clerk's office is directed to appoint an attorney to represent the plaintiff. The cost for such appointment is directed to be paid from the Library Fund and is directed to be consistent with the contract that applies in this district.

(5) The plaintiff's motion to amend (docket no. 3) is granted.

(6) The clerk's office is directed to serve the amended complaint on the defendants and mail a copy of the amended complaint to the Iowa Attorney General without the prepayment of fees and costs. A copy of this order is to accompany the documents being served. The Iowa Attorney General is directed to notify the court

immediately if he lacks the consent of the defendants to appear generally on their behalf and submit to the jurisdiction of the court. The defendants are directed to file an answer or other dispositive motion by no later than October 2, 2015.

**DATED** this 31st day of August, 2015.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line underneath it.

MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA

**TO: WARDEN/ADMINISTRATOR**  
**North Central Correctional Facility, Rockwell City, Iowa**

**NOTICE OF COLLECTION OF FILING FEE**

You are hereby given notice that Bernard Anthony Smith, #0807097, an inmate at your facility, filed the following lawsuit in the United States District Court for the Northern District of Iowa: *Smith v. Smith et al.*, Case No. C15-3094-MWB. The inmate was granted in forma pauperis status pursuant to 28 U.S.C. § 1915(b), which requires partial payments of the \$350.00 filing fee. Based on the inmate's account information, the court has assessed an initial partial filing fee of \$14.00, which the inmate must pay now to the clerk of court. 28 U.S.C. § 1915(b)(1).

After payment of the initial partial filing fee, the [inmate] shall be required to make monthly payments of 20 percent of the preceding month's income credited to [his] account. The agency having custody of the [inmate] shall forward payments from [his] account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

28 U.S.C. § 1915(b)(2). Therefore, you must monitor the account and send payments to the clerk of court according to the system provided in 28 U.S.C. § 1915(b)(2), that is, after the plaintiff pays the initial partial filing fee of \$14.00, you should begin making monthly payments of 20 percent of the preceding month's income credited to the inmate's account. Please make the appropriate arrangements to have these fees deducted and sent to the court as instructed.

/s/ djs, Deputy Clerk

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Robert L. Phelps  
U.S. District Court Clerk  
Northern District of Iowa

**NOTICE OF LAWSUIT  
and REQUEST FOR  
WAIVER OF SERVICE OF SUMMONS**

TO THE NAMED DEFENDANT(S) IN THE FOLLOWING CAPTIONED ACTION:

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

BERNARD ANTHONY SMITH,

Plaintiff,

vs.

CORNELL SMITH, KATHY WEISS, PAM WISE,  
DARIUS MILLER, JANET STANGE, BOB  
JOHNSON, MARY WITTRY, MURIEL  
MCDERMOTT, LYNN WUEBKER, JASON  
JANNSEN, ROBIN BAGBY, JOHN BALDWIN,

Defendants.

No. C15-3094-MWB

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint and a copy of the corresponding order from this court are attached. This complaint has been filed in the United States District Court for the Northern District of Iowa.

Pursuant to Rule 4 of the Federal Rules of Civil Procedure, you have an obligation to cooperate in saving unnecessary costs of service of summons and complaint. Please sign the enclosed document where appropriate acknowledging receipt of the complaint and notice of this pending lawsuit and waiving formal service of summons. After signing the enclosed document, please return it to the United States Clerk's Office in the envelope provided within thirty (30) days of this date: 9/1/2015.

I affirm that this notice and request for waiver of service of summons is being sent to you on behalf of the plaintiff, this September 1, 2015.

/s/ djs, Deputy Clerk  
Signature (Clerk's Office Official)  
Northern District of Iowa



**ACKNOWLEDGMENT OF RECEIPT OF  
NOTICE OF LAWSUIT,  
and WAIVER OF SERVICE OF SUMMONS**

(\*\*Return **this** document within thirty days after 9/1/2015, to the United States Clerk's Office in the envelope provided.)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

BERNARD ANTHONY SMITH,

Plaintiff,

vs.

CORNELL SMITH, KATHY WEISS, PAM WISE,  
DARIUS MILLER, JANET STANGE, BOB  
JOHNSON, MARY WITTRY, MURIEL  
MCDERMOTT, LYNN WUEBKER, JASON  
JANNSEN, ROBIN BAGBY, JOHN BALDWIN,

Defendants.

No. C15-3094-MWB

I acknowledge receipt of the complaint and notice of the lawsuit in which I (or the entity on whose behalf I am addressed) have been named a defendant. I have received and/or read the complaint accompanying this document.

I agree to save the cost of service of a summons and an additional copy of the complaint by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4 of the Federal Rules of Civil Procedure. I hereby waive service of summons.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the service of summons. I understand that a judgment may be entered against me (or the entity on whose behalf I am acting) if an answer or motion under Rule 12 of the Federal Rules of Civil Procedure is not served within 60 days after 9/1/2015, (the date Notice, Waiver and corresponding documents were sent).

Date \_\_\_\_\_

Signature \_\_\_\_\_

Printed name \_\_\_\_\_

As \_\_\_\_\_ of \_\_\_\_\_

(Title) (Entity)

Date \_\_\_\_\_

Signature \_\_\_\_\_

Printed name \_\_\_\_\_

As \_\_\_\_\_ of \_\_\_\_\_

(Title) (Entity)

Date \_\_\_\_\_

Signature \_\_\_\_\_

Printed name \_\_\_\_\_

As \_\_\_\_\_ of \_\_\_\_\_

(Title) (Entity)



**Address Form**

Case Number: C15-3094-MWB

Date: August 31, 2015

To: Clerk of Court

RE: Service on Named Defendants

Below, please find the known (or likely) addresses for the following persons/entities who have been named as defendants to this action:

Defendant: MARY WITTRY, MURIEL MCDERMOTT, LYNN WUEBKER  
Carroll County Recycling Center and Landfill  
19111 Kittyhawk Ave.  
Carroll, Iowa 51401

Defendant: ALL REMAINING DEFENDANTS  
North Central Correctional Facility  
313 Lanedale Drive  
Rockwell City, Iowa 50579